there have taken place are not competent* without a trial—by argument alone—to support a claim not then before the court, any more than evidence would have been, had there been evidence.

In order to get off the plane of abstraction, I shall examine one of the "facts" in question. In the colloquy of counsel to which respondents allude Herman Jaffee, of counsel for respondents, in the course of a discussion of the continuity of a chain of title, asserted:**

> Mr. Jaffee: These deeds were put on simultaneously. These corporations were all related, Harry Weintraub being secretary.
>
> Mr. Grimaldi [counsel for Hudson]: At the time of the foreclosure the owner was not joined in the proceedings.

An examination of the record shows that the deeds were not put on record simultaneously but a couple of years apart; and Harry Weintraub was not the secretary of any of the corporations. This falsehood was interpolated by Mr. Jaffee perhaps because that gentleman, besides representing the veterans who had been defrauded in this transaction, also represented the title company which had insured the mortgages made by the veterans in the aggregate sum

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* There exists a considerable body of doctrine, which it is not necessary to reproduce here, regarding the admissibility, at subsequent trials of the same issue and at trials of other matters, of admissions before a court. (*vide, e.g., Bowerman* vs. *Detroit Free Press*, 283 NW, 642, 644 [6-10]—Supreme Court of Michigan, 1939). Incidental remarks of counsel, or concessions made to expedite the trial at hand, are not so admissible. Only "solemn" admissions made, as it were, in the full light of day, are admissible, and then at subsequent trials, rather than subsequent arguments without trial, of different matters. The colloquy in our case discloses remarks by counsel which do not extend anywhere near the boundary where they would begin to qualify as proof. Inferences from such remarks have still less standing as proof than the remarks themselves. And there has been no showing of admissibility even of the tissue of inference available here, which is in any case too diaphanous to support the banner of public policy under which divestiture was made.

** Certified Record from Superior Court of New Jersey, Appellate Division, Appendix to Appellant's Brief, page 59a, lines 36ff.

of more than $100,000 (the veterans having paid down only a few hundred dollars each.) Both of his clients, the veterans and the title company, more especially the latter, stood to lose by the title error which Mr. Jaffee had passed*, and it was natural that he sought urgently to introduce some fiction into the case by which a flicker of life might be breathed, perhaps by artificial respiration, mouth to meretricious mouth, into the dead chain of title which his original client had insured on his certification. Mr. Grimaldi, counsel for Hudson, did not deny the false statement. There was no reason to deny it since it bore on no issue then before the court. There was no reason for Hudson's counsel to know one way or the other. Counsel therefore replied with the relevant consideration, and quite properly said nothing about Harry Weintraub's connection with this or that corporation. The statement appears in the transcript uncontradicted.

The Supreme Court of New Jersey took this as a relevant fact. In its Opinion setting up the trust ex maleficio, we read (Appendix to Petition herein, page 24a, second line):

> Harry Weintraub apparently was the secretary of both corporations.

One could run through the whole gamut of "facts" in this way. It would get in certain particulars to be a sophisticated discussion; and it is not pertinent. It is not the gravamen of the Petition to review putative *sequiturs* by which remarks made in colloquy might be dragged into the realm of inferred fact. In his Point III respondents' counsel suggests that it is, but the suggestion is misleading. The petition rests on the ground that the pertinent facts were not tried in the cause.

Petitioner respectfully calls attention to and enlarges the representation in his petition (though this representation is not part of the ground for review) that, in relation to

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* *Ibid.*, page 59a, line 21 and *passim*.

respondents, the facts are not in conformity with the statement upon which the court erected the trust ex maleficio; that the facts set forth in its Opinion are, as to respondents, substantially untrue; that the true facts, known in substance to petitioner, show that neither Hudson nor petitioner sought injury to respondents, and that any injury worked on them was procured by others. The facts are susceptible of proof in a court of law.

It is appropriate to notice here the question (briefly mentioned in the Petition) why petitioner did not seek review of the state court's Opinion in which the trust ex maleficio was originally constructed. Petitioner, like Hudson, sought no review of that opinion because he was content with it. The Opinion said in principle that one who oppresses another should be penalized by the construction of a trust in favor of the one oppressed. Petitioner has no quarrel with this view, nor, as he is informed, does Hudson. It would have been patently absurd to seek review by the Supreme Court of the United States of a doctrine (though of doubtful constitutionality) with which one is content. There survived an issue of fact. The Opinion covered two pieces of litigation, involving properties with different title histories. The issue of what facts applied to which properties was properly a question for the trial court. This is more especially true in this instance where, at the time the Opinion was handed down, not only did the Supreme Court of New Jersey evidently not know the answer to the pertinent questions, but neither did petitioner, nor Hudson. The facts had simply never been examined in any forum.

Investigation indicated to counsel that the facts did apply in part to certain of the householders, namely the Wansels and the Brons (here excluded.)

In trial court, to which the matter was remanded under the Opinion, and which was instructed to proceed in the matter "in accordance with its rules and practice" Hudson

objected to entry, on a mere motion to fix form of judgment, of blanket judgment against all the property in the absence of further proceedings to determine the facts as they applied to the several parcels; and counsel went so far as to object* on constitutional grounds to the entry of a judgment in the absence of such proceedings. That a judgment was nevertheless entered there, and subsequently affirmed by the highest court of the state, without any trial of the supposed facts, is the serious error in process which petitioner seeks to review.

Adjective Considerations

Respondents object to this petition on the formal grounds

a) petitioner was not among the parties who appealed the action below;

b) the question raised on this petition should have been raised earlier

i) before the state Supreme Court divested

ii) after the state Supreme Court divested and before the trial court entered judgment

iii) on petition for rehearing to the state Supreme Court.

a) It is true, as respondents assert, that petitioner was not formally on the appeal of the Amended Final Judgment, affirmance of which is here sought to be reviewed. That

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* Respondents' Brief (page 4) says he didn't, and inaccurately cites the Petition to that effect. The Petition (page 10) says that he did; and the certified record contains his language: "I object on constitutional grounds to entry of judgment" (Certified record from Superior Court of New Jersey, Appellate Division, Docket No. A-1172-63, Brief and Appendix of Defendants-Appellants, page 39a.) This was on motion to fix the form of judgment. Judgment had not been entered—it was under discussion. Petitioner, in his terminology, regards this not as a raising of the constitutional question but rather as an adversion to it. The question could not have been raised there, as respondents confusedly suggest it should, because no constitutional ground of appeal from the judgment could lie until after it was entered. Then it was raised (Petition, page 5).

appeal was by Hudson and Altomare from the "whole of the Amended Final Judgment" (except as to Bron.)* To that extent, the objection has merit. But respondents have no standing to raise it. In the trial court, judgment had originally been entered upholding the claims of Hudson, Altomare and petitioner. Respondents appealed, but only against Hudson and Altomare. No appeal was taken against petitioner.†

Notwithstanding there was no appeal against petitioner, the appellants there (the respondents here), upon prevailing in the state Supreme Court, procured judgment in trial court against petitioner as well as against Hudson and Altomare. This tactic by which respondents secured judgment against petitioner, even though no appeal had been taken against petitioner, bars the respondents from now objecting to the same recourse by petitioner against respondents. Respondents, as to the objection in point, raise it with unclean hands.

How these conflicting considerations will be viewed by this court is not for petitioner to say, though presumably the court will recognize the validity of petitioner's position. The question is in any case not pertinent to the matter before this court. Petitioner is the assignee of Hudson and Altomare.** Even if petitioner were barred on his own original claim, he would be competent to proceed on the assigned claims.††

Upon the petition being granted, the matter will go to the state court; and in that court the issue will be triable whether or not respondents have standing to raise the point.

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* Appendix to Petition, page 43a.

† The language was similar. The appeal (Certified Record, Appendix to Appellants' Brief, page 87a) was from the "whole of the final judgment . . . in favor of Hudson Trading Corporation, a New Jersey Corporation, and Frank Altomare".

** Petition, page 5, footnote.

†† Respondents' brief expresses doubt of the validity of the assignments to petitioner. The assignments are in writing and will be produced by petitioner on request. Petitioner has written to the Clerk of this court for permission to file copies.

The only question it affects is whether petitioner can claim his original interest, along with Hudson's and Altomare's assigned claims, or the latter two only. No doubt the considerations adduced here will be conclusive in that court in favor of preserving petitioner's original claim along with the others. The point need not be resolved here.

b) Respondents contend petitioner should have raised his question earlier:

i) Respondents' suggestion that petitioner should have questioned the Opinion of the Supreme Court of New Jersey before the Opinion issued, refutes itself.

ii) Respondents suggest an earlier petition to this court. This point was dealt with in its narrative order above, page 6.

iii) Respondents suggest a rehearing should have been sought in the state court. Under the Rules in New Jersey, an appellant may move for a rehearing, which may be granted, though it is not a matter of right.* The issue to be determined was one of fact. The proper tribunal for determination of facts is the trial court, not the Supreme Court of New Jersey, which exercises primarily an appellate jurisdiction, being the court of last resort in appeals. No doubt, on its own initiative, that court may hear testimony if it chooses; but it would have been impertinent for petitioner to have moved the Supreme Court of New Jersey to try the facts in a matter in which it had just entered an Opinion.

There is therefore no merit in any of the adjective considerations raised by respondents, except the single techni-

* R.R. 1:9-4 (c).

cal point a) above, and this point, ungraciously raised in the posture respondents are in, is anyway without relevance to the question of whether the review here sought should be granted.

Counsel for respondents concludes his brief with a plea to this court to throw petitioner out hastily because the "householders are still insecure in their possession as a result of this petition." The householders' insecurity is not a result of this petition. It arises from the fact they have no title. What they have is a judgment of a court of competent jurisdiction granting a trust in their favor against the legal owner, issued, in the absence of a trial of the facts on which the trust was constructed, by caprice.

Petitioner is willing, and has been willing at all times, to assist the householders in solving their title problems without injury to them, other than the injuries brought about by their own actions, and the actions of "their" counsel, subsequent to the discovery of their predicament.

HERBERT HARVEY,
Pro se.